No. 89-901

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

W.R. GRACE & CO. – CONN.,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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January, 1990

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QUESTIONS PRESENTED

Should this Court grant a Petition for Certiorari when:

1. The record of the case does not contain any basis for the allegations raised in the Petition?

2. The Petitioner created a very incomplete and inaccurate "record" from bits and pieces of depositions and materials from other cases?

3. The Petitioner did not timely raise the issue before the state courts?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The undersigned, counsel of record for Montana Department of Revenue, certifies that the following have an interest in the outcome of this case:

State of Montana

Montana University System

Montana Office of Public Instruction

Lincoln County Government, Lincoln County, Montana

School District #4, Lincoln County, Montana

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JURISDICTION

Exception is taken to petitioner's statement that the amended petition for rehearing was filed on time. It was not timely filed with the Montana Supreme Court. The amended petition for rehearing, which raised the question presented in this Petition for the first time, was filed on September 12, 1989, at least 10 days late under the rules of the Montana Supreme Court.[1]

There is no jurisdiction under 28 USC § 1257(a).

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[1] Rule 34, M.R.App.P., provides "a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered." Rule 34, M.R.App.P., is reprinted as Department's Appendix A, at 1a. The decision was rendered on August 18, 1989. The original petition for rehearing was filed on August 25, 1989. Grace's original petition for rehearing is reprinted as Department Appendix B, at 2a. That petition did not raise the issue presented in this Petition for Certiorari. Instead it raised for the first time two federal issues: 1) that the Montana Supreme Court "is denying taxpayer [Grace] due process of law and violating the commerce clause [to the U.S. Const.] by creating a new and additional test not imposed by the legislature;" and 2) that the Montana Supreme Court "by applying a different test [for the deductions under the Montana corporation income tax as opposed to the net proceeds tax] as to this taxpayer, has denied taxpayer equal protection of the law (Amendment XIV to the United States Constitution . . .) and violated taxpayer's constitutional rights under Article I, Paragraph 8, Clause 3 of the United States Constitution (commerce clause)." Dept. App. B at 3a-4a. This sequence of events leads to the suspicion that the Grace decided to take this case "all the way to the U.S. Supreme Court" and was casting about for federal issues.

STATEMENT OF THE CASE

This case is unique. It presents no issue of national concern. Further, the respondent, the Department of Revenue of the State of Montana, ("Department") disagrees the allegations in the petitioner's, W.R. Grace & Co. – Conn, ("Grace"), statement of the case on many critical points.

First, Grace has gone outside the record of this case and created a new record. This manufactured record is incomplete and inaccurate. Grace's statement of the case was created from selected "excerpts" of depositions and affidavits in two different cases: *Norfolk Energy, Inc. v. Department of Revenue,* Montana Twelfth Judicial District, Hill County, Cause No. DV-89-089 and *PacifiCorp. v. Department of Revenue,* Montana First Judicial District, Lewis and Clark County, Cause No. CDV-89-344.[2]

The excerpts from the depositions and affidavits relied upon by Grace do not reflect what actually happened in this case.[3] The deposition of an attorney, David

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[2] The *Norfolk* case was settled with the payment of $4.5 million dollars for taxes, interest and penalty after a District Court, in an original action, independently reached the same legal decision as STAB. *J. Burns Brown Operating Co. v. Department of Revenue,* Cause No. ADV-89-555, Montana First Judicial District, Lewis and Clark County, (Decided September 1, 1989). The *PacifiCorp* case is on remand back to STAB pursuant to a November 21, 1989 order which is reprinted as Department Appendix C at 7a.

[3] This case was mentioned five times in the Deposition of Paul Van Tricht, *Norfolk Energy, Inc. v. Department of Revenue,* Cause No. DV-89-089 (Mont. Twelfth Judicial District, Hill County), July 21, 1989. All five references are found in Department Appendix D at 16a.

Woodgerd, who was not directly involved in this case, does not reflect what happened in this case. Also, Grace took these excerpts out of context.

Grace's assertions that alleged ex parte communications and standard practices of the State Tax Appeal Board of the State of Montana (STAB) were "unbeknownst to Grace," "secret," and "without notice to opposing counsel" are not even supported by depositions and affidavits relied upon by Grace. Those portions of that record were omitted from Grace's Appendix.

For example, an excerpt from the *Norfolk* deposition rebuts Graces's central assertions that STAB's procedure was not known by Grace:

Q. And in Grace, Mr. Van Tricht?

A. No recollection of that at all; although I do know that George Bennett was aware of STAB's procedure because he told me.

Q. He did what?

A. He was aware of STAB's standard operating procedure because he told me he was after the case.

Q. And were you aware of it too?

A. I first became aware of STAB's standard operation after George Bennett told me about it. Since you're good friends, I assumed he would have told you about STAB's standard operating procedure too.

Q. That was in the Grace case; is that right?

A. Yes.

Deposition of Paul Van Tricht, *Norfolk Energy Inc. v. Department of Revenue,* Cause No. DV-89-089 (Mont. Twelfth Judicial District, Hill County), July 21, 1989. (Dept. App. D at 21a).

Mr. George Bennett was Grace's local attorney and has represented Grace throughout these proceedings. He has practiced before STAB since its creation in the early 1970s. As an experienced practitioner before STAB he was aware of STAB's "standard practices."

STAB's general practices and procedures were not a secret. They were the subject of one prior District Court opinion, *Helmmco, Inc. v. Department of Revenue,* Montana First Judicial District, Lewis and Clark County, Cause No. 5082, decided August 13, 1985. Excerpts of that decision are attached as Department Appendix E at 22a. The District Court decision did not find STAB's general decision writing practices unlawful. STAB's practice was often announced during or shortly after the hearing. (Grace App. K at 98a & 100a).

Therefore, this Petition presents several unresolved critical factual conflicts. Grace is asking this Court to make findings of fact to resolve these conflicts.

Second, the record of this case shows that STAB's substantive decision was uniquely its own. Its firm decision was reached before the alleged ex parte contact when STAB dictated the order. (Grace App. I at 88a-89a).

During 3 days of hearings Grace presented seven witness and many hundreds of pages of exhibits. On January 9, 1987, after the hearing and before the decision, Grace submitted a 73 page initial brief which contained

no less than 23 separately numbered requested findings of fact (27 pages). Excerpts from that brief are attached as Department Appendix F at 25a. Some of those requested findings of fact were substantially adopted in the final order. (Grace App. F at 49a & 53a-56a). On January 9, 1987, the Department also submitted its brief. On February 10, 1987, Grace filed a 30 page reply brief which fully responded to all the Department's arguments. Grace had a full and fair opportunity to present its entire case and all its arguments to STAB.

STAB did not adopt the Department's position in total. Indeed, it ruled against the Department on no less than seven separate deductions and three points of law.[4] STAB's rulings for and against both the Department and Grace showed that it carefully considered the evidence, the witnesses and the case in general in reaching its decision.

The members of STAB played active roles as the decision makers. In STAB's decision there was a dissent on one issue on which the majority held for the Department. That board member also dissented on another issue which was decided by the majority in Grace's favor. (Grace App. F at 73a-74a). A complete record in this case would show that the local counsel for Grace was contacted by the dissenter and told that a dissent was being

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[4] STAB allowed Grace almost a half million dollars in deductions which were not allowed by the Department. These deductions included the largest single deduction at issue – hauling and related expenses of $260,000. (Grace App. F, at 51a, 52a, 55a, 57a, 59a, 71a & 72a).

prepared. Grace's local counsel also was offered the opportunity to make suggestions on the dissent.

The Department cross-appealed STAB's decision to the District Court. That cross-appeal is attached as Department's Appendix G at 27a. The Department's arguments before the District Court mirrored those of Grace. The Department also felt that STAB's decision was "inconsistent." The District Court dismissed both Grace's appeal and the Department's cross-appeal. (Grace App. D at 41a).

Third, the record Grace has created does not support its assertion that it did not discover the alleged ex parte communications until after the petition for rehearing was filed with the Montana Supreme Court. In 1988, after the decision of the state district court, Grace retained a second local attorney, Terry B. Cosgrove. (Grace App. B at 19a). Mr. Cosgrove also represented PacifiCorp, and he took part in the deposition of David Woodgerd on June 6, 1989.[5] That portion of the Woodgerd deposition is attached as Department's Appendix H at 31a. Mr. Cosgrove knew of the alleged ex parte communications no later than June 6, 1989. (Grace App. L at 103a). Yet, Grace did not raise this issue under Rule 3 M.R.App.P. before the decision of the Montana Supreme Court on August 18, 1989. It did not raise this issue in its original Petition for Rehearing on August 25, 1989. It waited over three months, until September 12, 1989, to raise the issue.

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[5] Mr. Cosgrove was an attorney (employee) for the Department in 1973 and 1974. He worked for the Department under contract until 1985.

Fourth, Grace was not faced by procedural barriers or an unusually limited scope of review of STAB's decision before Montana courts. The standards in Montana for review of administrative decisions are essentially the same as those applied to administrative decisions by federal and other state courts.[6] When the Montana Supreme Court has found that STAB has committed an error, that Court has not hesitated to overturn STAB's decision.[7]

Grace's complaints about the restrictions on the scope of review are refuted by the actual review that was conducted by the Montana Supreme Court:

> Neither party contest the valuation of the deductions declared by Grace nor whether Grace actually incurred the expenses claimed. Therefore, the question raised by Grace's first issue – whether the deductions are statutorily permissible – *involves only a question of law.*

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[6] See, e.g., *Udall v. Tallman*, 380 U.S. 1 (1965). Review of the Department's administrative decisions which are not made subject to STAB's de novo review are themselves subject to the same standard of judicial review in Montana district courts as STAB decisions.

[7] See, e.g., *Dept. of Revenue v. St. Tax Appeal Bd.*, 613 P.2d 691 (Mont. 1980), *DeVoe v. Dept. of Revenue of Montana*, 759 P.2d 991 (Mont. 1988), *State Dept. of Revenue v. Paxson*, 666 P.2d 768 (Mont. 1983), *Dept. of Revenue v. Countryside Village*, 667 P.2d 936 (Mont. 1983), and *Hi-Line Radio Fellowship v. Dept. of Rev.*, 737 P.2d 886 (Mont. 1987). In each case the Montana Supreme Court reversed a STAB decision in whole or in part. Indeed that court, in one of the cases which Grace cited for its argument that it was "confined" by the standards of judicial review, *Department of Revenue v. Grouse Mountain Development*, 707 P.2d 1113 (Mont. 1985), in fact, reversed STAB's decision.

> Likewise, the second issue presented for review – whether the deficiency assessment is barred by the statute of limitations – *involves solely a question of law.* Thus, we will use the *broader* "abuse of discretion" *standard* in our analysis of both issues. (Emphasis supplied.)

W. R. Grace & Company v. Dept. of Revenue, 779 P.2d 470, 473 (Mont. 1989).[8] (Grace App. B at 24a-25a).

The Montana Supreme Court then independently proceeded to analyze the issues based on the Montana statutes and its past decisions. Procedural error by STAB would not change the Montana Supreme Court's analysis of the substantive legal issues in this case or the final outcome on those issues.

SUMMARY OF ARGUMENT

The Petition should be denied because:

1. The record does not support the issue which Grace has raised in its Petition. Grace has constructed an incomplete and inaccurate record outside of the official record. Grace is asking this Court to become a fact finder.

2. The issue raised in this Petition was not timely raised in or ruled on by the Montana courts.

---

[8] The statute of limitations issue was submitted upon a stipulation of fact as were many of the other issues involved in this case. (Grace App. F at 46a). Throughout its arguments before the Montana Supreme Court Grace emphasized that there was no dispute about the facts.

3. The issue raised in this Petition currently is before the Montana courts in other cases and will be resolved by those Montana courts on independent state grounds.

4. The issue raised in this Petition could not affect the decision of the Montana Supreme Court which turned on that court's legal interpretations of a unique Montana tax.

5. Since federal courts have already addressed this general issue and rejected Grace's argument; no significant federal issue has been raised by the Petition.

REASONS WHY THE PETITION SHOULD BE DENIED

GRACE DID NOT TIMELY RAISE THE ISSUE BEFORE THE STATE COURTS – THE RECORD DOES NOT SUPPORT GRACE'S PETITION

It is essential for jurisdiction under 28 U.S.C. § 1257(a) that "any title, right, privilege of immunity is specially set up or claimed under the Constitution" before the state courts in a timely manner. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Despite the knowledge of the basis for this Petition by its local attorneys, Grace did not raise this question before the District Court or before the Montana Supreme Court in its appeal, or in its original petition for rehearing. Grace raised this issue in an amended petition for rehearing which was filed after the time allowed by the rules of the Montana Supreme Court.

Fundamental policy considerations underlie this jurisdictional requirement of 28 USC § 1257(a). First, federal constitutional issues not raised in the state courts

"are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind." 394 U.S. 437, at 439. This case illustrates that general observation. Here Grace is asking this Court to consider a *constitutional* issue with absolutely no record on that issue. The allegations, which it has manufactured for this Court from bits and pieces of the records of two other cases, are inaccurate and misleading. Since it consists of the record of other proceedings, it does not reflect what actually happened in this case. There are conflicts in this manufactured record that this Court will have to resolve to reach the issue raised in this Petition. For example, this Court will have to determine if the alleged ex parte contacts were truly "without notice to opposing counsel." This Court will become a trial court.

Without an accurate record Grace wants this Court to decide a *constitutional* issue and significantly expand the due process clause of the XIV Amendment of the United States Constitution.

Judicial economy is another reason for this jurisdictional requirement. If a federal question is timely raised in the state courts, the question might "be blocked" by a decision of the state court based on independent state grounds, thereby rendering unnecessary any Supreme Court review of the federal issue. *Ibid.*

This case also illustrates that reason. As shown in Grace's Appendix this issue has been raised in several other cases currently pending in Montana courts. Recently, in the *PacifiCorp* case the District Court remanded the case back to STAB because it considered STAB's procedure in that case, based upon the record in

that case, "unlawful" under Montana law, MCA 2-4-613. (Dept. App. C at 13a-14a). Although the *PacifiCorp* decision appeared to distinguish the facts in that case from facts in *Helmmco*, that decision appeared to conflict with the *Helmmco* decision. (Dept. App. E at 22a). Both cases were decided solely upon Montana law.

Given these decisions its clear that the controversy over STAB's procedures soon will be finally resolved by Montana courts. The final resolution probably will be based solely upon Montana law. Therefore, review by this Court would be redundant, and the effect of a decision in this case will be confined to this case alone.

The substantive heart of this case involves two issues of Montana law which were definitively decided by the Montana Supreme Court. Procedural error would not affect the decision of the Montana Supreme Court on those two issues.

This case is not of sufficient general importance to merit this Court's consideration.

NO SIGNIFICANT DUE PROCESS ISSUE HAS BEEN RAISED BY THE PETITION – FEDERAL COURTS HAVE REJECTED GRACE'S ARGUMENT

Upon a manufactured, inaccurate record Grace wants this Court to expand the due process clause of the XIV Amendment to the United States Constitution. Essentially, Grace wants this Court to issue an advisory opinion, a type of hypothetical declaratory judgment or writ of supervisory control.

The mere fact that the prevailing party reduced a court's decision to writing is not a violation of the *constitution*.

Grace has selectively misconstrued the holdings in several cases. For example, in *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985), this Court held: "Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." In *Anderson* this Court reversed a decision by the 4th Circuit, *Anderson v. City of Bessemer City, N.C.*, 717 F.2d 149, *rehearing and rehearing en banc denied* (4th Cir. 1983), which had reversed a District Court decision. When the 4th Circuit reversed the District Court decision in *Anderson*, it relied upon the same *Chicopee* dicta which is being relied upon by Grace in its petition. 717 F.2d 149, at 156.

The language quoted by Grace from *Chicopee Manufacturing Corp. v. Kendall Company*, 288 F.2d 719, 724-25 (4th Cir. 1961) *cert. denied*, 368 U.S. 825 (1961), was dicta because the federal district court's decision was reversed and remanded on the merits of the decision. That dicta was not been followed in a recent decision by the 4th Circuit, *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, *rehearing denied* (4th Cir. 1989), which instead applied this Court's decision in *Anderson*. The 4th Circuit realized that this Court effectively *reversed* the dicta in *Chicopee* with its *Anderson* decision.

The *Chicopee* dicta, although quoted, also was not followed in a decision by the 8th Circuit in *Bradley v. Maryland Casualty Company*, 382 F.2d 415 (8th Cir. 1967).

In *Bradley* counsel for the defendants apparently prepared the findings and conclusions and the court's supporting memorandum without notice to opposing counsel. On the issue of whether this practice violated the opposing parties right to due process, the 8th Circuit concluded: "We see no deprival of any constitutional right or anything which warrants reversal for this alone." 382 F.2d 415, at 423.

The most recent case cited by Grace, *In re Colony Square Co.*, 819 F.2d 272 (11th Cir., 1987), *cert. denied*, 108 S. Ct. 1271 (1988), holds exactly contrary to Grace's arguments. Colony Square was in Chapter 11 bankruptcy. At issue was the ownership and control of assets called Colony Square Complex. Prudential Insurance moved to compel compliance with the reorganization plan. After hearing the case, the judge telephoned Prudential's lawyers and informed them that he intended to rule in Prudential's favor. He asked for draft orders. Colony Square's lawyers were not informed. While stating its disapproval, the 11th Circuit held "[t]he fact that a judge allowed a litigant to draft the court's orders does not automatically invalidate these orders, however." 819 F.2d 272, at 276.[9]

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[9] In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964), Justice Douglas stated:

> There was a trial, and after oral argument the judge announced from the bench that judgment would be for appellees and that he would not write an opinion. He told counsel for appellees 'Prepare the findings and conclusions and judgment.' They obeyed, submitting 130 findings of fact, and one conclusion

(Continued on following page)

In *Colony Square* the Circuit Court further found there was no denial of due process because the judge had already made his decision when he called Prudential's attorneys and because Colony had ample opportunity to present its arguments. "Having reviewed the record in this case we conclude that Colony *was not denied due process." Ibid.* (Emphasis supplied.)

Grace has failed to timely raise a *substantial federal* question.

(Continued from previous page)

> of law, all of which, we are advised, the District Court adopted verbatim. Those finding, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence (cite omitted).

If Justice Douglas felt that practice violated a parties right to due process, he certainly would have said so. This decision was rendered after *Chicopee*. Also see *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n.13 (1974).

CONCLUSION

For the reasons presented above, the Petition for Certiorari should be denied.

DATED this 23rd day of January, 1990.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 34. Petitions for rehearing

When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 88-266

W. R. GRACE & CO., a Corporation,

Petitioner/Appellant,

-vs-

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Defendants/Respondents.

APPELLANT'S PETITION FOR REHEARING

COMES NOW the Appellant, W. R. Grace & Co., and for its petition to this Court pursuant to Rule 34 of the Montana Rules of Appellate Procedure, respectfully requests the Court to reconsider its decision for following reasons:

I

a. Petitioner requests that the Court reconsider its decision as to the statute of limitations issue and find and determine that under the law the Respondent, Montana Department of Revenue, has no jurisdiction or authority to assess or collect the net proceeds of mines tax deficiencies asserted for the taxable years 1977 and 1978.

b. The grounds for this request are the facts and questions decisive there, submitted by counsel, were

overlooked by the court, viz., the Court in its opinion rendered August 18, 1989 overlooked and failed to deal with the extensive and decisive legislative history behind Chapter 194, Laws of 1983, which resulted in § 15-23-116, RCM [sic]. That legislative history was submitted to the State Tax Appeal Board by "Agreed Statement and Stipulation Covering Statute of Limitations Issue" dated November 26, 1986, and appearing as Tab B in Appellant's Appendix's Appellant's Brief filed with this Court.

c. This Court will find on examination of such legislative history that the Montana Legislature in 1983 expressly dealt with the contentions of the taxpayer and the Department of Revenue as to whether or not there was a two year or ten year limitation.

d. The Court will find from an examination of this legislative record that Chapter 194 was enacted as a result of the presentation by the parties of their contentions as to the two year or ten year statute of limitations, as one uniform and comprehensive statute (15-23-116) that limited DOR in all cases and as to both assessment and collection of deficiencies with respect to net proceeds.

e. The Court will find from an examination of this legislative history that the issue involved is not a question of repeal by implication. The legislature expressly by the language of § 15-23-116, RCM [sic], mandated that there be but one statute controlling and that DOR had no further or other authority under any other statute, whether it is the two year or the ten year statute referred to.

f. Petitioner would again respectfully call the attention of the Court to this legislative history, and particularly to the report of the Senate Taxation Committee of February 9, 1983.

II

a. The Court in its opinion in this matter, by creating requirement that costs or expenses to be deductible for net proceeds tax purposes must be "direct", has judicially created a test which does not appear in the controlling statutes and therefore has denied due process of law to the taxpayer (Amendment XI to the United States Constitution and Article II, Section 17 of the Constitution of the State of Montana), and violated taxpayer's constitutional rights under Article I, Paragraph 8, Clause 3 of the United States Constitution (commerce clause).

b. Nowhere in the controlling statutes is there a requirement that the costs or expenses be "direct."

c. Thus the Court is denying taxpayer due process of law and violating the commerce clause by creating a new and additional test not imposed by the legislature.

III

a. The Court by its opinion (page 12) distinguishes the *Caterpillar* case (633 P.2d 618, 38 State Reporter 1245, Montana 1981) on the grounds that the tax there involved was "selfassessing;" and that the net proceeds tax is "centrally assessed."

b. In fact the Department of Revenue continually argued (Respondents' Brief, p. 56), and STAB specifically

found (Findings, pp. 22-23) that the net proceeds tax is "self-assessing."

c. Therefore the test for both the corporation license tax and the net proceeds tax should be the same since they are both identical types of taxes according to the findings in this matter.

d. Thus the Court, by applying a different test as to this taxpayer, has denied taxpayer equal protection of the law (Amendment XIV to the United States Constitution and Article I Section 17 of the Constitution of the State of Montana), and violated taxpayer's constitutional rights under Article I, Paragraph 8, Clause 3 of the United States Constitution (commerce clause).

WHEREFORE your Appellant respectfully requests the Court to:

(1) Grant limited rehearing and upon rehearing to determine as a matter of law that the Department of Revenue's asserted deficiencies for 1977 and 1978 are barred by § 15-23-116, RCM [sic].

(2) Grant limited rehearing and upon rehearing to determine as a matter of law that the Department of Revenue's asserted deficiencies for 1977, 1978 and 1979 are erroneous because there is no legal requirement that the disputed costs and expenses be "direct."

DATED this 25th of August, 1989.

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ATTORNEYS FOR
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CERTIFICATE OF SERVICE BY MAIL

I certify that on this 25th day of August, 1989, a true and correct copy of the foregoing APPELLANT'S PETITION FOR PARTIAL REHEARING has been served by placing the same in the United States mail, postage prepaid, and addressed as follows:

PAUL VAN TRICHT
Tax Counsel
Department of Revenue
Mitchell Building
Helena, MT 59620

/s/ George T. Bennett
GEORGE T. BENNETT

APPENDIX C

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFICORP, an Oregon corporation, Petitioner, vs- THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and STATE TAX APPEAL BOARD OF THE STATE OF MONTANA, Respondents.	)	Cause No. CDV-89-344 *MEMORANDUM AND ORDER*

* * *

BACKGROUND

On May 18, 1989, Plaintiff PacifiCorp filed a petition for judicial review of the entire decision rendered by the State Tax Appeal Board (STAB) in Docket No. CT-1985-2. PacifiCorp requests this Court to review STAB's decision to uphold the Department of Revenue assessment against PacifiCorp of additional taxes due, plus interest, for 1974 through 1979, and the Department's denial of a refund for PacifiCorp for the years 1971 through 1979.[1] STAB issued

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[1] The refund requested by PacifiCorp was for $2,369,078 plus interest. The additional tax assessed due to the audit was approximately $1,116,795, after allowing for a refund of taxes paid by PacifiCorp affiliates other than Western Minerals and Resource Development.

(Continued on following page)

its order on February 28, 1989, after hearing the matter on May 16 through May 20, 1988.

Both the Department of Revenue (hereinafter Department) and PacifiCorp have filed cross-motions for partial summary judgment on one of the issues raised by PacifiCorp's petition for judicial review. The Department filed its motion on May 18, 1989, with an accompanying brief. PacifiCorp filed its motion and accompanying brief on July 7, 1989. Both parties filed reply briefs and oral arguments were heard on August 30, 1989. The matter is now deemed submitted for decision.

FACTS

On February 9, 1989, Dale Dean, Chairman of STAB, contacted David Woodgerd, the Department's Chief Legal Counsel. Woodgerd Aff., pp. 2-3. Dean informed Woodgerd that STAB had decided the case of Department of Revenue v. PacifiCorp, Inc. in favor of the Department, and requested the Department to prepare a draft decision document for review by the Board. Dean dictated the basis of the Board's decision to Woodgerd and Woodgerd drafted the findings of fact, conclusions of law, discussion and order and submitted the draft document to STAB on about February 22, 1989. Woodgerd Aff,, pp. 2-3. STAB

(Continued from previous page)

Therefore the difference between a full refund and payment of the tax is almost $3.5 million. Interest continues to accrue on both the refund request and the assessment. The total difference including interest is now more than double this amount.

requested and received a copy of the draft document on a computer disc for ease in editing. Woodgerd Aff., p. 3. STAB issued findings of fact, conclusions of law, discussion and order in this case on February 28, 1989. STAB used the Department's draft verbatim, except for the omission of "§" and "¶" signs and two typographical errors. Vashro Aff., pp. 1-3.

Neither STAB nor the Department gave PacifiCorp notice of these contacts, a copy of the draft, an opportunity to respond to the Department's draft or an opportunity to submit a similar draft of its own. Woodgerd Depo, pp. 44, 81.

At the administrative hearing, counsel for PacifiCorp specifically asked STAB in the Department's presence whether STAB would be willing to receive proposed findings and conclusions from the parties. STAB stated that it would not. Neither STAB nor the Department stated that STAB would or might request the prevailing party to prepare a draft decision in this case. Cosgrove Aff., p. 2; Ormseth Aff., pp. 1-2; Woodgerd Depo., p. 85.

Since 1985, when *Helmmco, Inc. v. Department of Revenue*, No. 50827, 1st Jud. Dist. (Mont. 1985) was decided, the Department has, at STAB's request, followed the practice of dropping draft decisions off at STAB, rather than mailing the drafts with a transmittal cover letter. Woodgerd's understanding of the reason for this practice is that it is better not to have a transmittal letter so that opposing counsel would not be aware when the Department prepared the findings as it did in the *Helmmco* case. Woodgerd depo., p. 29.

By chance, on February 22, 1989, Woodgerd met and spoke with John Shepherd, Pacificorp's principal representative in the litigation. Shepherd Aff., p. 2. Shepherd inquired of Woodgerd when he thought the decision would be handed down and how STAB might inform the parties of its decision. Woodgerd gave no indication that he had already been contacted by STAB and had in fact already prepared a draft decision. Instead, Woodgerd simply replied that STAB would sometimes proceed by contacting the prevailing party and asking that party to submit a proposed decision. Shepherd Aff., p. 2. PacifiCorp contends that when Woodgerd and Shepherd spoke, Woodgerd deliberately kept secret the fact that the Board had contacted him, informed him of its decision in favor of the Department, and requested him to prepare a draft decision for the Board, which he had already completed. It is not clear from the facts presented how or when PacifiCorp learned that the Department and not STAB had drafted the decision in this case.

DISCUSSION

Both the Department and PacifiCorp seek summary judgment on the question of whether, as a matter of law, unlawful procedure occurred at the administrative level when STAB rendered its decision in favor of the Department and against PacifiCorp. PacifiCorp also alleges prejudicial ex parte communication occurred between STAB and the Department, such as to violate PacifiCorp's constitutional due process and statutory rights.

1. Did STAB err in adopting verbatim the findings of fact and conclusions of law prepared by the Department?

In this case STAB adopted verbatim the findings of fact and conclusions of law prepared by the Department. Although the Montana Court has stated that it disapproves of this practice, it is not sufficient to constitute reversible error provided the findings and conclusions are supported by the evidence presented. *Sun Dial Land Co. v. Gold Creek Ranches*, 198 Mont. 247, 645 P.2d 936 at 940 (1982); *Tomaskie v. Tomaskie*, ___ Mont. ___, 625 P.2d 536, 38 St. Rep. 416 (1981).

2. *Was the contract between STAB and the Department an ex parte consultation prohibited under MCA 2-4-613?*

The Department's motion for partial summary judgment requests this Court to rule that "there was no unlawful procedure [by STAB] at the administrative level as alleged on pages 6 and 7 of PacifiCorp's Petition for Judicial Review." The Department relies heavily on Judge Loble's decision in *Helmmco, Inc. v. Dept. of Revenue, supra,* for support of STAB's practice of contacting the prevailing party without notice to the opposing party. There are, however, significant differences between *Helmmco* and this case.

In *Helmmco,* the court upheld STAB's decision on the merits after reviewing the entire record. Despite the parties' failure to object to STAB's announcement that it might contact the prevailing party to draft a decision, the court registered its disapproval of the practice employed by STAB in adopting the prevailing party's draft decision. *Helmmco, Inc. v. Department of Revenue,* No. 50827, 1st Jud. Dist., p. 13 (Mont. 1985).

In this case, STAB solicited, obtained and adopted verbatim a draft decision, including findings of fact and

conclusions of law, from one party without notice to the opposing party. The Board did this despite previously telling both parties that it would not accept any proposed findings of fact and conclusions of law from the parties.

In support of its position that no unlawful ex parte contact occurred, the Department cites an Oregon case where that court held that an attorney had not engaged in illegal ex parte contact. *In re Bernard K. Smith*, 295 Or. 755, 670 P.2d 1018 (1983). In *Smith*, the Oregon court looked at whether the content of the ex parte communication was on "the merits of the cause." *Id.*, 670 P.2D 1020. The court defined the merits of a proceeding as having to do with the legal rights or duties of the parties. *Id.* In that case the court held that since the ex parte contact did not affect any legal right or duty of the parties, it was therefore not on the merits of the cause, and hence not impermissible ex parte contact. *Id.*

In this case, the Department implies that since STAB had already reached its decision and merely requested the Department to draft a decision in accordance with that decision, the ex parte contact had no effect on the case. The Department argues that the contact between STAB and the Department was not prohibited as it did not go to the merits of the decision. However, such a position does not acknowledge the importance of the findings of fact and conclusions of law in a proceeding for judicial review.

PacifiCorp points out that on appeal it is bound by the findings of fact and conclusions of law contained in STAB's order. While the Department was able to draft these findings and conclusions to its own advantage,

PacifiCorp had neither notice nor opportunity to propose or argue its own findings or conclusions.

The Department also cites this Court to a recent Montana Supreme Court decision where the Court denied both the petition for rehearing on the merits and the amended petition for rehearing alleging unlawful procedure very similar to the case here. *W.R. Grace v. DOR*, No . 88-266 , decided September 14, 1989, not yet published. When the petition for rehearing was filed in *Grace*, the time period allowed under Rule 34, M.R.App.P. had already expired. In denying the petition, the Court gave no indication as to whether it was denied on substantive grounds or procedural grounds. Therefore the *Grace* decision provides no guidance to this Court for the case at hand.

In addition, the Department justifies the practice of having the prevailing party draft decisions on the basis of the volume of the decisions heard by STAB. However, the volume of decisions issued by STAB does not preclude giving both parties notice and opportunity to submit a proposed order, findings of fact and conclusions of law.

Having fully considered this matter, the Court concludes that in order to protect the integrity of the administrative decision-making process, there must be notice and opportunity for opposing parties to respond to communications when there is "any connection with any issue of fact or law." MCA 2-4-613 (1989).

3. *What is the proper remedy for unlawful procedure?*

Since PacifiCorp contests the lack of opportunity to participate by submitting its own proposed findings of

fact and conclusions of order, the proper remedy is to give PacifiCorp an opportunity to submit its own proposed findings and conclusions. Even though STAB used unlawful procedure, that does not necessarily warrant setting aside the entire decision. It would be premature for this Court to review the merits of STAB's decision until both parties have had an equal opportunity to submit proposed findings and conclusions. Remanding this case to STAB with instructions to allow both parties an opportunity to submit their findings and conclusions will provide adequate relief to PacifiCorp. Moreover, if this Court were to review the merits without regard to the unlawful procedure employed by STAB, then STAB would be free to continue the unlawful procedure which formed the basis of this dispute.

CONCLUSION

Based on the foregoing, the Court concludes that STAB's order dated February 28, 1989 is invalid due to unlawful procedure and should be vacated. The Court further concludes that this case should be remanded to STAB with instructions to accept and consider proposed findings of fact and conclusions of law from both parties in this matter before issuing a final order. The parties should also be given an opportunity to submit additional argument in support of their positions.

ORDER

NOW, THEREFORE, IT IS ORDERED that STAB's order dated February 28, 1989, is hereby set aside and vacated.

IT IS FURTHER ORDERED that this matter be, and hereby is, remanded to STAB which shall accept and consider proposed findings of fact and conclusions of law and memoranda of points and authorities from both parties before issuing its final order.

DATED this 21st day of November, 1989.

/s/ Thomas Honzel
DISTRICT COURT JUDGE

pc: Terry B. Cosgrove
Milo E. Ormseth
Charles A. Smith
David W. Woodgerd

APPENDIX D

MONTANA TWELFTH JUDICIAL DISTRICT
HILL COUNTY

NORFOLK ENERGY INC., Petitioner, -vs- DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondents and BLAINE, CHOUTEAU and HILL COUNTIES, Intervenors.	)	Cause No. DV-89-089

DEPOSITION OF PAUL VANTRICHT

BE IT REMEMBERED, that the deposition upon oral examination of PAUL VANTRICHT, appearing at the instance of Petitioner, was heard at the Offices of the Department of Revenue, State of Montana, Mitchell Building, Helena, Montana, on the 21st day of July, 1989, beginning at the hour of 9:30 a.m., before Sherron Walstad, Court Reporter, Notary Public.

* * *

CRARY & HENDRICKSON REPORTING
17 West Sixth Avenue, Power Block West
P.O. Box 1222
Helena, Montana 59624
(406) 443-0080

P. 27 (lines 14 – 24)

Q. (By Mr. Sites] What's your best recollection at this point?

A. My best recollection is that I recall them referring to at least one case.

Q. What case was that?

A. The *W. R. Grace versus the Department of Revenue* case.

Q. Do you recall their referring to any other cases?

A. I don't recall them referring to any other cases. That does not mean that they didn't refer to them. That means I can't recall at this time.

P. 31 (lines 15) through P. 32 (line 9)

Q. The decision document also contains a discussion, including a number of case law citations.

A. Yes.

Q. Were these cases discussed at the meeting? You indicated one case was, the Grace case, I believe?

A. Yes. I don't have the document you're looking at in front of me.

Q. (Mr. Sites hands document to Mr. VanTricht.) Was a case of Hoover and Bracken Energies discussed.

A. Hoover and Bracken Energies? I don't recall.

Q. Was the case of Exxon Corporation versus Eagerton discussed?

A. I don't recall.

Q. So really the only case that you recall being discussed is the Grace case; is that correct?

A. That's the only case that I can recall at this time being discussed. However, that does not mean that other cases were not discussed. Again, this wasn't a discussion. It was three parties giving me the reasons for their decision.

P. 35 (line 2) through P.36 (line 20)

Q. Do you know why they contacted you to write a draft decision for them in this case?

A. No, other than the fact that it is one of their standard procedures.

Q. Certainly every case that you are involved in with the board you don't draft a decision?

A. No. I sometimes lose.

Q. How many decisions have you drafted for the board?

A. We're talking about decisions which they dictated to me. Oh, golly. I can recall at this time, and there may be more; let's see, three or four that I can recall. There may more.

Q. Do you recall the names of those cases?

A. Hold it. I've got to go back, I don't know what you mean by decisions. There may have been more, you know. Well, let's go back. Could you repeat the question?

Q. How many times has the board requested of you to prepare draft proposed findings of fact and conclusions of law?

A. Again, it's maybe four times. They've asked me to prepare orders of other natures.

Q. Right, but a draft decision document similar to what was prepared in Tricentrol.

A. Right. You're talking about similar?

Q. Yes.

A. I think four or five.

Q. Was one of them a case called Somont, S-o-m-o-n-t?

A. Yeah, I believe so, yes.

Q. Vanderpas, V-a-n-d-e-r-p-a-s-s –

A. I believe so, yes.

Q. And Grace?

A. Probably, I think so,

Q. And Mountain State Resources?

A. I don't recall Mountain State Resources. I don't recall that case, but then again, if it took place over a couple years ago, I could or couldn't. I'm not quite sure.

Q. Did the board indicate at the meeting, or at any time, why it was asking you to prepare the draft decision document?

A. You mean in so many words?

Q. Yeah. Did they indicate why they were approaching you in the TriCentrol case?

A. Directly, no. I mean, this is their standard procedure.

P. 61 (line 25) through P. 63 (line 9)

Q. When you say your recollection of the events, you're referring to the events in the Pacific Corp. proceeding?

A. I have almost no – I was not counsel on Pacific Corp. In fact, I was only vaguely aware that there was such a thing as Pacific Corp. until recently.

Q. You were tax counsel in Somont?

A. Yes. A Somont case, I'm not sure if there might have been more than one.

Q. This is a case where you had drafted the decision document for the Tax Appeal Board; that Somont case.

A. Yes, I was tax counsel on that Somont case.

Q. Did the board at the conclusion of the hearing, or otherwise, indicate that the prevailing party might be requested to draft the decision document?

A. I can't recall one way or the other. That case was four or five years ago, so I have almost no recollection at all.

Q. How about in Vanderpas; what, if any, indication –

A. Again, I have no – nothing at all in my – I couldn't state one way or the other.

Q. And in Grace, Mr. VanTricht?

A. No recollection of that at all; although I do know that George Bennett was aware of STAB's procedure because he told me.

Q. He did what?

A. He was aware of STAB's standard operating procedure because he told me he was after the case.

Q. And were you aware of it too?

A. I first became aware of STAB's standard operation after George Bennett told me about it. Since you're good friends, I assumed that he would have told you about STAB's standard operating procedure too.

Q. That was in the Grace case; is that right?

A. Yes

APPENDIX E

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * *

HELMMCO, INC., a Delaware corporation, Petitioner, -vs- DEPARTMENT OF REVENUE and the STATE TAX APPEAL BOARD of the State of Montana, Respondents	No. 50827 ORDER CONCERNING PETITION FOR JUDICIAL REVIEW

SUMMARY OF ISSUES AND DECISION

P. 12 (line 18) through P. 14 (line 12)

MOTION TO ADMIT EVIDENCE OF OFF RECORD PROCEDURAL IRREGULARITIES

As concerns this motion, it appears that STAB may have taken the position, at the time of hearing below, that neither the Department of Revenue nor taxpayer Helmmco should present proposed findings of fact and conclusions of law. Thereafter, it appears that when STAB had made a determination as to what it wished to do, it asked the attorneys for the Department of Revenue to prepare its decision. The Department attorneys did this, and STAB adopted that proposed decision. As noted above, the decision did not adopt the original proposal of the

Department for a two factor formula, but, rather, adopted a position somewhat midway between the positions of the Department and the taxpayer. Helmmco asserts that it should have had the right to argue exceptions to the proposed decision submitted, upon request, to STAB by DOR.

If the Court granted the motion, and proof was made, it would according to Helmmco, show the facts to be as previously set forth by this Court. Our Supreme Court has indicated that, in the case of district court appeals to it, the Court does not approve of district judges adopting, verbatim, the findings of any party. However, as our Supreme Court has also remarked, the question is whether the findings of fact and conclusions of law are "clearly erroneous" upon the record. *Speer v. Speer*, ___ Mont. ___, 654 P.2d 1001, 39 St. Rep. 2204 (1982); *Glasser v. Glasser*, ___Mont. ___, 669 P.2d 685, 40 St. Rep. 2204 (1983). In this case, there is no doubt that the findings which STAB did adopt are supported by the record, and that the conclusions of law made by STAB did not constitute an abuse of discretion nor do they offend against the legislative intent in adopting UDITPA.

I do not approve of the procedure used by STAB nor of the wholesale adoption of the proposed findings and conclusions of any party. Nevertheless, When those findings and conclusions are supported by the record, they must be upheld by this Court. Helmmco's motion to admit evidence of off record procedural irregularities is denied.

JUDGMENT

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner, Helmmco, shall take nothing by its petition for judicial review, and the same is denied and dismissed.

DATED this 13th day of August, 1985.

/s/ Henry Loble
DISTRICT JUDGE

cc: Counsel of Record

APPENDIX F

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

W. R. GRACE & CO., a corporation	)	
Petitioner	)	No. MT-1989-9
vs	)	
DEPARTMENT OF REVENUE OF THE STATE OF MONTANA	)	

BRIEF FOR PETITIONER

PAUL H. FRANKEL
W. R. Grace & Co.
Grace Plaza
1114 Avenue of the Americas
New York, NY 10036-7794

GEORGE T. BENNETT
404-406 Fuller Avenue
P.O. Box 1705
Helena, Montana 59624

ATTORNEYS FOR W.R. GRACE & CO.

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PETITIONER'S REQUEST FOR FINDINGS OF FACT 4

ARGUMENT

I. The statute of limitations bars an assessment for 1977 and 1978 31

II. The disputed deductions disallowed by the Department of Revenue ("DOR") for 1977, 1978 and 1979 are all allowable under § 15-23-503 because the moneys involved were expended for (i) necessary labor, machinery and supplies needed and used in the vermiculite mining operations and developments of W.R. Grace & Co. ("Grace") at Libby; (ii) costs of repairs and replacements of the milling and reduction works used in connection with the mine; (iii) transportation of the vermiculite from the mine to the mill, the reduction works and the place of sale; (iv) marketing the vermiculite; and (v) converting the vermiculite into money 47

CONCLUSION 73

APPENDIX G

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

W. R. GRACE & COMPANY, a corporation,	)	
Petitioner,	)	Cause No. ADV 87-610
-vs-	)	RESPONSE OF THE
DEPARTMENT OF REVENUE OF STATE OF MONTANA; and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA	)	DEPARTMENT OF REVENUE OF STATE OF MONTANA AND CROSS PETITION
Respondents	)	

* * *

COMES NOW the Department of Revenue of the State of Montana ("Department") and responds to the Petition of W.R. Grace & Company ("Grace"):

I

The Department admits the allegations contained in paragraphs 1, 3, 5, 6, 7, and 8 of the petition. The Department admits the allegations contained in paragraph 4 except it denies the allegation that Grace's headquarters in Cambridge, Massachusetts are "supporting facilities".

II

The Department denies the allegations contained in paragraphs 9, 11 and 12 of the petition.

III

The Department responds to the allegations contained in paragraph 10 by stating the "disallowed" deductions are fully set forth in the April 21, 1987 Order of the State Tax Appeal Board. (Grace's Exhibit A).

IV

The allegations in paragraphs 2, 13 and 14 do not require a response.

V

The petition does not state grounds upon which this Court can grant Grace any relief.

VI

The Department denies any allegation not admitted hereinabove and denies any allegation which Grace alleges as the basis for granting any relief.

CROSS PETITION

VII

The State Tax Appeal Board erred in allowing the deduction of the following "expenses":

(a) The watchman expenses;

(b) The reimbursed hauling and related costs during period river crossing conveyor was inoperative;

(c) The safety portion of "Safety, Labor Relations";

(d) The salaries and benefits for the Manager, Assistant Manager, and Chief Geologist; and

(e) The legal fee of filing water rights claims, and the consulting fee for obtaining patents on mining claims.

DEMAND

The Department requests the Court to:

1. Dismiss Grace's petition;

2. Modify the order of the State Tax Appeal Board by not allowing the deduction of the expenses which are set forth in paragraph VII hereinabove; and

3. Grant such other and further relief as this Court deems just and proper.

DATED this 2nd day of July, 1987.

MONTANA DEPARTMENT OF
REVENUE
Office of Legal Affairs
Mitchell Building
Helena, MT 59620-2702

/s/ Paul Van Tricht
PAUL VAN TRICHT
Tax Counsel

CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 1987, a true and correct copy of the foregoing has been served by placing same in the United States mail, postage prepaid, and addressed as follows:

George T. Bennett
111 North Last Chance Gulch
P.O. Box 1705
Helena, MT 59624-1705

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Cambridge, MA 02140

/s/ Paul Van Tricht

APPENDIX H

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PACIFICORP, an Oregon corporation, Petitioner, v. THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, and STATE TAX APPEAL BOARD OF THE STATE OF MONTANA, Respondents.	)	No. CDV-89-344

DEPOSITION UPON ORAL EXAMINATION
OF DAVID WOODGERD

BE IT REMEMBERED, that the deposition upon oral examination of DAVID WOODGERD, appearing at the instance of Petitioner, was heard at the law offices of Luxan & Murfitt, Montana Club Building, Helena, Montana, on the 6th day of June, 1989, beginning at the hour of 11:00 a.m., pursuant to the Montana Rules of Civil Procedure, before Laurie Crutcher, Court Reporter, Notary Public.

APPEARANCES:

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